

Kharbanda (Migration) [2020] AATA 4838 (5 August 2020)



Administrative Appeals Tribunal 1.

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr Somil Kharbanda
Mrs Chetna Sachdeva

CASE NUMBER: 1807465

DIBP REFERENCE(S): BCC2017/1116845 BCC2018/1948202

MEMBER: Roslyn Smidt

DATE: 5 August 2020

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the applications for Skilled Nominated (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 190 - Skilled - Nominated visas:

- Public Interest Criterion 4020 (1) for the purposes of cl.190.216 of Schedule 2 to the Regulations.

I, Member Roslyn Smidt, certify that this is the
Tribunal's statement of decision and reasons

2.

Statement made on 20 October 2020 at 1:55 pm

CATCHWORDS

MIGRATION – Skilled Nominated (Permanent) (Class SN) visa – Subclass 190 (Skilled – Nominated) – false or misleading information – overseas employment experience – worked at three dental clinics in India – performance of the full duties of a dentist – Departmental site visits – information in prior visitor visa application – withdrawal of 189 visa application – credible witness – decision under review remitted

3.

LEGISLATION

Migration Act 1958 (Cth), ss 65

Migration Regulations 1994 (Cth), Schedule 2, cl 190.216; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 7 March 2018 to refuse to grant the applicants Skilled Nominated (Permanent) (Sub class 190) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 22 March 2017. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.190.216 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found that he had provided information that was false or misleading in a material particular relating to his overseas employment claimed for skilled migration points in accordance with clause 190.214 and therefore was not satisfied that he met Public Interest Criterion (PIC) 4020, subclause 4020 (1).
6. The applicants appeared before the Tribunal on 5 August 2020 to give evidence and present arguments. The applicants were represented in relation to the review by their registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.190.216 for the grant of the visa. At issue in the applicant's case is where PIC 4020(1) is met. This requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

9. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
10. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
11. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However,

an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

12. The information in question in this case is the applicant's claim that he worked at three dental clinic in India; Dental Lifestyle from July 2011 to January 2012; 32 Pearls Dental from February 2012 to March 2013 and Poly Dental Clinic and Implant Centre from 1 April 2013 to 10 June 2016 (with a break from January to May 2014).
13. On 9 September 2015 an officer from the New Delhi office of the Department telephoned 32 Pearls Dental and spoke to two employees, both of whom said that they had worked at the clinic for many years but had no knowledge of the applicant.
14. On 22 January 2016 Department officers visited Dental Lifestyle premises and were informed that the applicant had assisted the dentist to perform non-surgical extractions and also did impressions, prosthetic work, cleaning and scaling. The officers noted that the clinic had only one room and one chair.
15. On 22 January 2016 officers from the New Delhi officers also visited the premises of Poly Dental. They were told that the applicant assisted in filling, scaling and extraction of teeth, but did not perform surgeries or implants. They were also told that more senior dentists commenced treatment on patients who were then handed over to the applicant for the remaining treatment. They were advised that an appointment register was not maintained but were shown patient records which only mentioned the applicant once or twice. They were also told that only one or two patients visited the clinic each day. The officers then telephoned the applicant who told them that 5 or 6 patients visited the clinic most days. They noted that there were only two chairs in the clinic.
16. On 27 November 2017 the delegate wrote to the applicant pointing out that it appeared that he had not performed the full duties of a dentist while working at Dental Lifestyle and Poly Dental and had never worked at 32 Pearls. In addition, the delegate noted that in a visitor visa application lodged in September 2014 the applicant had stated that he worked for Dr Sameer Kaura, his referee in relation to his work at 32 Pearls, at the time when according to his 190 visa application he was working for Poly Dental at that time. The letter also noted that the applicant appeared to have provided incorrect information on visitor visa applications, stating that he was unemployed or a student during periods in which he later claimed to have been working as a dentist.
17. In response to a letter from the Department dated 27 November 2017 the applicant provided a number of documents including updated references, including references from Dental Lifestyle and Poly Dental both of which stated that the information which staff had provided during the Department visits in 2016 had been misinterpreted or misunderstood and that the applicant had been employed as a professional dentist at their clinics. He also provided a letter from Dr Sameer Kaura which stated that 32 Pearls operated two clinics, one in Ludhiana where the applicant worked and another in Phagwara, where the Department called. With regard to the issues relating to his visitor visa applications he said that these problems might have arisen because of confusion or misunderstanding on the part of previous representative and lack of care on his part.
18. The delegate did not accept the applicant's explanations. He found that information obtained during integrity checks conducted in 2015 and 2016 indicated that the applicant had inflated his duties at Dental Lifestyle & Poly Dental and had never worked at 32 Pearls Dental. He also found that the applicant was responsible for the incorrect information on his visitor visa applications. In addition, he noted that the applicant had applied for a 189 visa on 12 June 2015 at which time he resided in India. He provided the same information and references in support of that application as those used in his current application and it was this application

which triggered the integrity visit by Department officers. When asked to comment on the problems raised by the officers who conducted the review the applicant said that the allegations were unsatisfactory and withdrew his application on 14 June 2016. The delegate found this a further indication that the applicant had not provided an accurate account of his employment in India.

19. In submissions provided prior to the hearing the applicant's representative noted, inter alia, that the Department visits were conducted without prior warning to the clinics concerned. He said he had spoken the applicant's referee at Dental Lifestyle who told him that he had been busy when the officers arrived and had only spoken to them briefly. He was not happy discussing his employee with the officers and did not elaborate on his duties. He confirmed that the applicant's account of his duties was accurate. With regard to the applicant's employment at the other clinic he repeated the applicant's earlier explanations and made a number of submissions regarding why this evidence should be accepted.
20. At the hearing the applicant maintained that he had worked for three dental clinics mentioned in his application. He provided a convincing account of his duties and hours of work at all three clinics. He said that it appeared that the officer who spoke to staff at 32 Pearls may have spoken to more junior staff who would not have been aware of his employment in the Ludhiana clinic. He said that it appeared the Department staff who visited the clinics had misunderstood some of the information they were provided. He said that while it was true that he had assisted other dentists at the clinics visited, the work he had done was as a professional dentist, not a nurse or assistant. He said that dentists at the clinics worked shifts and that there were two dental chairs in different rooms at the Dental Lifestyle clinic. He also noted that small clinic such as the ones for which he had worked were often not very good at record keeping.
21. With regard to the information on the applicant's visitor visas and the withdrawal of the 189 visa application lodged in India, at the hearing he explained that he initially engaged a migration agent who he later learned was not competent or particularly honest which had caused him some problems. With regard to the withdrawal his sub class 189 visa, the applicant stated that this was done because he had been offered work in Australia by someone who was willing to sponsor him. He applied for a 457 visa on 12 May 2016 and the visa was granted on 7 June 2016.
22. I found the applicant to be a credible and convincing witness when he gave evidence at the hearing. I accept that he was employed at a different branch of 32 Pearls from the branch contacted by Department officers in 2015. I note that Ludhiana and Phagwara are about 45 minute apart by road and it is plausible that employees at one branch may not have known those who worked at the other, particularly as the applicant only worked for 32 Pearls Dental for about a year and had ceased working there some two years before the Department contacted the clinic. Furthermore, while I accept that the reports provided following the site visits to the other clinics accurately reflect the understanding of the Department officers who conducted the visits, I also accept that they may not have been provided with a complete or an accurate account of the applicant's duties by the staff they interviewed and may also have misunderstood some of this information.
23. With regard to the information on the applicant's visitor visa I accept that these were advertent errors made by his migration agent and they do not cause me to doubt the evidence provided by the applicant in support of the application which is the under consideration here. With regard to his withdrawal of the 189 visa application after he was asked to comment on the matters raised during the site visits, I accept that this was withdrawn because he had been granted a 457 visa, not in response to the Department's letter regarding the issues raised in the site visits and inquiries into his employment in India.

24. After considering all of the relevant information I am satisfied that the applicant has not provided a bogus document or false or misleading information in relation to a material particular his application for a sub class 190 visa. He therefore meets PIC 4020(1). In these circumstances it is appropriate to remit the matter to the department for further consideration.

CONCLUSION

25. On the basis of the above, the applicant satisfies PIC 4020 (1) for the purposes of cl.190.216.

DECISION

26. The Tribunal remits the applications for Skilled Nominated (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 190 - Skilled - Nominated visas:
- Public Interest Criterion 4020 (1) for the purposes of cl.190.216 of Schedule 2 to the Regulations.

Roslyn Smidt
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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